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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

CASE NO. 01-931

THE STATE OF FLORIDA,

Petitioner,

vs.

SHELTON SCARLET,

Respondent.

ON PETTION FROM WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Where the Florida Supreme Court's decision was based exclusively on two prior opinions by that court which interpreted the scope of an article of the state constitution, should certiorari be denied as this Court has always recognized that judgments by the highest court of a state as to the meaning and effect of its own constitution are decisive and controlling?

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JURISDICTION

The petitioner relies on 28 U.S.C. § 1257(a), as the basis for jurisdiction in this case. However, 28 U.S.C. § 1257(a), is not applicable because the Florida Supreme Court's decision in *State v. Scarlet,* 800 So. 2d 220 (Fla. 2001), was premised solely on its interpretation of article I, section 12 of the Florida constitution and no "title, right, privilege, or immunity" was "specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authorized under, the United States."

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, § 12 of the Florida Constitution, which provides:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

STATEMENT OF THE CASE

Mr. Scarlet was placed on probation for a term of one year for burglary. While on probation, he was detained by the police and his car was illegally searched. The search revealed a trafficking amount of cocaine. The trial judge found that the warrantless search was unsupported by probable cause, reasonable suspicion, or consent and thus suppressed the evidence with respect to the trial on the substantive drug offense. The trial court, however, admitted the evidence at the probation revocation hearing on the authority of *Pennsylvania Bd. of Probation and Parole v. Scott,* 524 U.S. 357 (1998), and subsequently sentenced Mr. Scarlet to a 54 month term of incarceration for violating his probation.

The Third District Court of Appeal, relying on the Florida Supreme Court's interpretation of article I, section 12 of the state constitution, reversed the probation revocation order. *See State v. Cross,* 487 So. 2d 1056 (Fla. 1986); *State v. Soca,* 673 So. 2d 24 (Fla. 1996). The appellate court based its decision on established Florida precedents construing the conformity clause of article I, section 12. The Florida Supreme Court has stated that United States Supreme Court Fourth Amendment decisions must be directly on point, otherwise Florida may grant greater protection to its citizens than the federal constitution requires. *See State v. Soca,* 673 So. 2d 24. The appellate court held that *Scott* did not control the outcome of this case because

Scott involved a parole violation proceeding, which differed significantly from probation violation hearings in Florida.

> The Florida Supreme Court has held that in the absence of a controlling federal decision directly on point, evidence obtained through an unlawful search is inadmissible in a probation revocation hearing. *See State v. Cross,* 487 So. 2d 1056 (Fla.1986). Since then the United States Supreme Court has held that such evidence is admissible in parole revocation hearings. *See Pennsylvania Parole Bd. v. Scott,* 524 U.S. 357, 118 S.Ct. 2014, 141 L.Ed.2d 344 (1998). However, a parole hearing is substantively different, as it is not part of a criminal prosecution. A parole hearing is an administrative proceeding conducted by non-lawyers in a non-judicial setting; "traditional rules of evidence generally do not apply." *Id.* at 366, 118 S.Ct. 2014. "The exclusionary rule, moreover, is incompatible with the traditionally flexible, administrative procedures of parole revocation." *Id.* at 365, 118 S.Ct. 2014. Probation revocation hearings, however, are under the court's jurisdiction and generally lead to sentencing hearings that require the appointment of counsel. *See Floyd v. Parole and Probation Comm'n,* 509 So. 2d 919 (Fla.1987). In short, parole revocation hearings and probation revocation hearings are very different proceedings.

Scarlet v. State, 766 So. 2d 1110, 1111 (Fla. 3d DCA 2000). The Florida Supreme Court agreed with the Third District's holding and affirmed the decision on the basis of state constitutional jurisprudence with respect to the meaning of article I, section 12 of the Florida constitution. *State v. Scarlet,* 800 So. 2d 220 (Fla. 2001).

REASONS FOR DENYING THE WRIT

THE FLORIDA SUPREME COURT'S DECISION WAS BASED EXCLUSIVELY ON TWO PRIOR OPINIONS BY THAT COURT WHICH INTERPRETED THE SCOPE OF AN ARTICLE OF THE STATE CONSTITUTION. CERTIORARI SHOULD THEREFORE BE DENIED AS THIS COURT HAS ALWAYS RECOGNIZED THAT JUDGMENTS BY THE HIGHEST COURT OF A STATE AS TO THE MEANING AND EFFECT OF ITS OWN CONSTITUTION ARE DECISIVE AND CONTROLLING.

The Florida Supreme Court's decision in *State v. Scarlet*, 800 So. 2d 220 (Fla. 2001), is not subject to certiorari review because it did not involve any federal constitutional issues. The Florida Supreme Court's holding rested exclusively on its prior construal of the conformity clause of article I, section 12, of the Florida constitution and not on a Fourth Amendment interpretation. Florida has held that the conformity clause of the state constitution requires that United States Supreme Court Fourth Amendment decisions be directly on point before Florida will grant less protection to its citizens than state law would otherwise entail. *See Soca v. State,* 673 So. 2d 24 (Fla.), *cert. denied,* 519 U.S. 910 (1996). In *Scarlet,* the Florida Supreme Court held that *Pennsylvania Bd. of Probation and Parole v. Scott,* 524 U.S. 357 (1998), did not apply to probation revocation hearings because *Scott* involved a parole revocation hearing. Parole and probation revocation hearings in Florida are substantially different kinds of proceedings. In light of Florida's strict interpretation

of the conformity clause, therefore, it was apparent that *Scott* did not extend to Florida probation revocation hearings as a matter of state constitutional construction. *See, e.g., PruneYard Shopping Ctr. v. Robins,* 447 U.S. 74, 81 (1980) (noting that state courts are free to interpret their state constitutions to provide greater protection than the federal constitution).

This Court has long held that the highest state court enjoys the sole authority to interpret the "meaning and effect" of its own constitution. *Highland Farms Dairy v. Agnew,* 300 U.S. 608 (1937); *see also, Minnesota v. National Tea Co.,* 309 U.S. 551, 557 (1940) ("It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions."). The Florida Constitution permits the state courts to grant greater protection from unreasonable searches and seizures than provided by the Fourth Amendment. In Florida, searches and seizures are governed by article I, section 12 of the state constitution. As amended in 1982, article I, section 12, contains the following language:

> This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

This provision does not place the Florida constitution in strict conformity with the

Fourth Amendment, however. The Florida Supreme Court has held that the state constitutional rights are only affected by decisions of this Court which are directly on point: "[I]n the absence of a controlling U.S. Supreme Court decision, Florida courts are still 'free to provide its citizens with a higher standard of protection from governmental intrusion than that afforded by the Federal constitution.'" *Soca v. State*, 673 So. 2d 24, 26 (Fla. 1996), *quoting State v. Lavazzoli*, 434 So. 2d 321, 323 (Fla. 1983). The holding in *Scarlet* thus rests on the Florida Supreme Court's interpretation of the meaning of the Florida constitution.

In Florida, it has already been decided that under article I, section 12 the exclusionary rule applies to probation revocation hearings. *See Grubbs v. State,* 373 So. 2d 905 (Fla. 1979); *State v. Cross,* 487 So. 2d 1056 (Fla.), *cert. dismissed*, 479 U.S. 805 (1986). Florida has also determined that there are important differences between parole revocation hearings and probation revocation hearings. *See Floyd v. Parole and Probation Commission,* 509 So. 2d 919 (Fla. 1987). It follows that since *Scott* involved a parole revocation proceeding, it was not directly on point and therefore could not control the outcome in this case, as a matter of state constitutional construction.

In *Scott,* the Court premised its holding, in part, on the informal nature of parole revocation hearings, which the Court characterized as "flexible,"

"nonadversarial," and "administrative." The majority concluded that the exclusionary rule would not function well within such an informal context. *Scott,* 524 U.S. at 365-67. The Court also expressed its reluctance to intrude on the states and thus allowed them great freedom to adopt relaxed parole revocation procedures that best suited their needs. *Id.*

> We have long been averse to imposing federal requirements upon the parole systems of the States. A federal requirement that parole boards apply the exclusionary rule, which is itself a "'grud[g]ingly taken medicament,'" would severely disrupt the traditionally informal, administrative process of parole revocation. The marginal deterrence of unreasonable searches and seizures is insufficient to justify such an intrusion. We therefore hold that parole boards are not required by federal law to exclude evidence obtained in violation of the Fourth Amendment.

Scott, 524 U.S. at 369 (citation omitted).

Under Florida constitutional jurisprudence, *Scott* cannot be expanded to probation violation hearings because it specifically dealt with a parole revocation proceeding. Florida recognizes several important disparities between probation and parole revocation hearings. In *Floyd,* 509 So. 2d 919, for example, the Florida Supreme Court considered whether a parolee is entitled to court appointed counsel at a parole revocation proceeding. The Court determined that the right to counsel did not exist because of the substantive differences between parole and probation.

Revocation of parole is not part of a criminal prosecution, and thus the

> full panoply of rights due a defendant in such a proceeding does not apply to parole revocations. While there are similarities in probation and parole, there are also some significant differences.
>
> Probation is under the jurisdiction of the courts, and it was in the exercise of our authority over the court system that we determined in [*State v. Hicks,* 478 So. 2d 22 (Fla. 1985)] that counsel must be furnished in all probation revocation hearings. Parole is administered by the Commission. Moreover, parole revocation proceedings are conducted by nonlawyers. Requiring that counsel be furnished in every case would inevitably lead to the use of counsel by the state. As noted in *Gagnon* [*v. Scarpelli*, 411 U.S. 778 (1973)] the decision-making process would be prolonged and the financial cost to the state would be substantial. Finally, unlike probation revocation, parole revocation does not lead to a sentencing hearing which necessarily requires the appointment of counsel.

Id. at 920. Pursuant to section 947.23, Florida Statutes (2000), a parole revocation is determined in an administrative, extra-judicial setting by non-lawyers. The hearing is not adversarial in nature, unlike probation revocation hearings. A commission, which usually consists of three or more commissioners, receive evidence and "[i]f the hearing was conducted by three or more commissioners, a majority of them shall enter an order determining whether the charges of parole violation have been sustained, based on the findings of fact made by them." § 947.23(6)(a) FLA. STAT. (2000).

Florida probation is considered an integral part of the criminal prosecution. Therefore, probation revocation hearings are "trial-like adversarial proceeding[s]" where probationers enjoy the right to counsel. *Holmes v State,* 448 So. 2d 1070, 1074

(Fla. 1st DCA 1984). Probationers may avail themselves of the discovery process (including the right to take depositions), *Cuciak v. State,* 410 So. 2d 916 (Fla. 1982), and traditional rules of evidence, although exercised with less rigidity, apply. *See Reatz v. State,* 677 So. 2d 963 (Fla. 3d DCA 1996). By contrast, in federal probation revocation hearings, the rules of evidence do not apply, since probation is considered civil in nature. *See* FED. R. EVID. 1101(d)(3); *United States v. Pierre,* 47 F.3d 241, 242 (7th Cir. 1995). Also, federal probationers do not enjoy an automatic right to counsel. *See Gagnon v. Scarpelli,* 411 U.S. 778, 790 (1973) (the Court found "no justification for a new inflexible constitutional rule with respect to the requirement of counsel," and held that "the decision as to the need for counsel must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system.")

In *Soca,* 673 So. 2d 24, the Florida Supreme Court rejected the applicability of *Griffin v. Wisconsin,* 483 U.S. 868 (1987), which held that evidence seized by a probation officer during a warrantless search of the defendant's home, on less than probable cause, could be admitted in a criminal prosecution. The Court held that the rule it had established in *Grubbs,* 373 So. 2d 905, which allowed probation officers to search a probationer's residence on reasonable grounds provided that any evidence derived therefrom could only be used in a violation hearing, arose from state law. The

Grubbs rule had since been codified in the Department of Corrections operational manual and formed part of the regulatory scheme by which the state supervised probationers. *Soca,* 673 So. 2d at 27. The Wisconsin statute, on which *Griffin* was based, placed probationers in the custody of the department of health and social services and contemplated a supervisory framework which was different from Florida's scheme.

> [W]e reject the State's argument, as well as the district court's conclusion, that Florida's statutory scheme regulating probation supervision, sections 948.03 and 948.06, Florida Statutes (1995), is sufficiently analogous to the Wisconsin regulation at issue in *Griffin v. Wisconsin,* 483 U.S. 868, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987), so as to make the holding in Griffin controlling here. In *Griffin*, the U.S. Supreme Court upheld a search of a probationer's residence, stating, "The search of Griffin's residence was 'reasonable' within the meaning of the Fourth Amendment because it was conducted pursuant to [Wisconsin's] valid regulation governing probationers." *Id.* at 880, 107 S.Ct. at 3172. The Wisconsin law in question there put probationers in the legal custody of the State Department of Health and Social Services and specifically rendered them "subject ... to ... conditions set by the court and rules and regulations established by the department." WIS. STAT. § 973.10(1) (1985-86). One of the Department's regulations explicitly permitted any probation officer to search a probationer's home without a warrant as long as his supervisor approved and as long as there were "reasonable grounds" to believe contraband was present--including any item that the probationer was not allowed to possess under the probation conditions. WIS. ADMIN. CODE HSS §§ 328.21(4), 328.16(1)(Dec. 1981). Wisconsin's rule provided that the officer should consider a variety of factors in determining whether "reasonable grounds" existed, among which were information provided by an informant, the reliability and specificity of that information, the reliability of the informant (including whether the informant had any

incentive to supply inaccurate information), the officer's own experience with the probationer, and the "need to verify compliance with rules of supervision and state and federal law." *Id.* § 328.21(7). Another regulation made it "a violation of the terms of probation to refuse to consent to a home search." *Griffin*, 483 U.S. at 870-71, 107 S.Ct. at 3167.

Unlike Wisconsin's statutory scheme, *see* WIS. ADMIN. CODE HSS §§ 328.21(4), 328.16(1) (Dec. 1981), Florida's statutes contain no scheme expressly authorizing or regulating the authority of probation officers or supervisors to conduct a probationary search when it is supported by "reasonable grounds." Rather, a probation officer's right to search is based on our holding in *Grubbs*, wherein we expressly limited the use of the fruits of such a search to probation proceedings. Accordingly, we find that the instant case is clearly distinguishable from *Griffin*, and under *Grubbs* the evidence obtained in the probationary search of Soca's trailer is not admissible against him in a new criminal proceeding.

As this case illustrates, the *Grubbs* rule regulating probationary searches and the admissibility of evidence discovered therein has served as a workable framework for the DOC for over sixteen years, and we believe it remains a sound policy today. There has been no demonstration that our decision in *Grubbs* does not represent a proper balancing of the need to maintain effective supervision and control over probationers with the long-held constitutional right of each citizen to be free from searches and seizures which violate the principles of article I, section 12, of the Florida Constitution.

The *Grubbs* rule gives the State considerable leeway in investigating and monitoring probationers. When the State believes that a probationer is engaging in criminal behavior, the State may choose to inform probation officials of his alleged criminal conduct and place further responsibility for investigating his conduct with those officials. Apprised of this information, the probation supervisor may exercise his or her authority to search the probationer's person or residence for evidence that the probationer is violating the terms of his

> probation. Should the probation supervisor discover such evidence, it can be used against the probationer in a probation revocation proceeding.
>
> On the other hand, the State may choose to continue its investigation and attempt to secure a warrant to search the probationer's residence in compliance with traditional search and seizure standards under article I, section 12, of the Florida Constitution. The State may also utilize the fact that the subject of its investigation is on probation as part of the circumstances establishing the probable cause necessary to secure a warrant.

Soca, 673 So. 2d 27-28 (footnote omitted). Based on the differences between Wisconsin's probationary framework and that of Florida, the Florida Supreme Court concluded that the conformity clause barred the adoption of *Griffin* and this Court subsequently denied review.

In this case, the petitioner espouses a Procrustean equivalence between the factual substrata of *Scott* and *Scarlet*. The petitioner's assertions in its application for review, however, concede that *Scott* is inapplicable based on Florida's interpretation of its own constitution. The petitioner admits that the Florida Supreme Court "based its holding on the fact that this Court has not specifically held that the exclusionary rule does not extend to probation revocation hearings." BRIEF OF PETITIONER at 9. The petitioner then goes on to urge the Court to "*extend* the rule of law that the operation of the exclusionary rule does not extend to non-criminal trials to probation hearings." BRIEF OF PETITIONER at 11 (emphasis added). The petitioner thus

acknowledges that *Scott* only addressed the question of the exclusionary rule in the context of parole violation hearings and that this Court has not expanded *Scott* to probation revocation hearings.

The Florida Supreme Court appropriately decided that Mr. Scarlet's case was controlled by settled precedents of state constitutional construction with respect to article I, section 12. Moreover, *Scarlet* is not in conflict with *Scott*, or any other federal decisions, because they are not authoritative with respect to how the Florida Supreme Court construes the state constitution. Therefore, this Court should reject certiorari in this case on the fundamental principle that state courts are free to interpret their own constitutions. *See Minnesota v. National Tea Co.*, 309 U.S. at 557.

CONCLUSION

The decision below constitutes an exercise of the Florida Supreme Court's authority to interpret the meaning and effect of the Florida constitution and not a determination of federal constitutional jurisprudence. This Court should, therefore, deny the Petition for Writ of Certiorari to the Supreme Court of Florida.

Respectfully submitted,

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